

Witness Name: Andrea Sutcliffe
Statement No.: Two
Exhibits: Four
Dated: 31 May 2024

THIRLWALL INQUIRY

SECOND WITNESS STATEMENT OF ANDREA SUTCLIFFE

I provide this statement in response to a request for a supplementary statement further to my statement of 2 February 2024. I am authorised by The Nursing and Midwifery Council ('the NMC') of 23 Portland Place, London, W1B 1PZ to provide this witness statement. I, Andrea Sutcliffe of the NMC will say as follows:

Background

1. In paragraph 254 of my statement of 2 February 2024, I indicated that the NMC was considering whether we needed to make further amendments to our interim order guidance to clarify the approach that decision-makers should take to evidence at the interim stage.
2. We published our updated 'INT-2 Decision making factors for interim orders' guidance on our website on 25 March 2024 (INQ0017804). We also made minor amendments to INT-1 (INQ0017805) and INT-3 (INQ0017806) and FtP-5 (INQ0017807) to reflect the changes made to INT-2. Guidance documents INT-1, INT-2 and INT-3 are all part of the Interim Orders section of our Fitness to Practise Guidance Library. FTP-5 is part of the Understanding Fitness to Practise section in that Library.
3. A further minor change was made to INT-2 on 10 April 2024, clarifying that our normal process is for the evidence relied on in relation to an interim order application to be shared with the professional concerned. Exhibit INQ0017804 includes this small amendment.
4. In this statement I explain:
 - i. why the guidance changes have been made; and

- ii. the substantive effect of those changes

Why the guidance changes have been made

5. The updates to the interim order guidance are part of a rolling programme of guidance updates based on our commitment to keeping our fitness to practise guidance library under continuous review. Factors that led us to review the interim order guidance included:
 - i. concerns that the reference in our previous guidance to the need for 'a prima facie case' before an interim order could be sought, might be unnecessarily restrictive¹;
 - ii. concerns that our approach to interim orders might be inconsistent with that taken by other regulators (notably the General Medical Council);
 - iii. concerns about our interim order decision-making in relation to the Lucy Letby criminal investigation.
6. In July 2023 a decision was taken internally to update our interim order guidance with publication planned for the first half of 2024.

The substantive effect of the changes made

7. Our previous guidance invited decision-makers to adopt a two staged approach when deciding whether or not to impose an interim order. The first stage was to consider whether there was 'sufficient evidence' or a 'prima facie case' of a regulatory concern; only then would panels move on to consider whether one or more of the three potential grounds for making an interim order set out in Article 31(2) of the NMC Order was met².
8. Our new guidance moves away from the two staged approach, adopting instead a more holistic approach. Decision-making panels are invited to consider the following three principles when making their decision:

Evidence of the concern

- i. Panels are advised to consider all the evidence presented before them when evaluating the concerns surrounding a professional's fitness to practise. The guidance states explicitly that there is no evidential threshold in the NMC Order but advises that there must be "some evidential basis" for the concern. Panels will need to be satisfied that the evidence of any concern is cogent, and is not

¹ The development of guidance document INT-2 is explained at paragraphs 130 – 138 of my statement of 2 February 2024. Paragraph 135 explains why the reference to the need for 'a prima facie case' was added in October 2019.

² The three potential grounds set out in Article 31(2) of the NMC Order are 1) it is necessary for the protection of members of the public or 2) is otherwise in the public interest, or 3) is in the interests of the person concerned.

fanciful, not frivolous, not obviously contradicted by other evidence or entirely misconceived.

Nature and seriousness of concern

- ii. Panels are advised to look at the nature and circumstances of the concerns relating to the professional's fitness to practise to understand the gravity of what has been alleged. Panels should then consider the risks going forward in allowing a professional to continue to practise without restrictions.

Proportionality and applying the Article 31(2) grounds

- iii. Having carefully looked at the risks in a particular case, panels are invited to weigh these against the professional's interests and consider whether one or more of the three potential grounds set out in Article 31(2) of the NMC Order applies.

- 9. The three principles summarised above and set out in the new guidance will be applicable to all interim order applications. The new guidance goes on to give specific advice about the factors to be considered when the panel is considering serious criminal allegations. The following paragraphs are particularly relevant:

A criminal charge may well provide cogent evidence of a concern, particularly if we are satisfied that the decision to charge and prosecute the person was made following a robust consideration of the evidence. However, we do not always need to wait until a person has been charged before applying for an interim order, and in appropriate cases we may decide that a case should be put before a panel for interim order consideration prior to charge.

Our decision will be based on the information available to us, including the seriousness of what is being investigated, and any implications that has in respect of public safety or public confidence. In cases of the utmost seriousness, the panel may be satisfied that there is cogent evidence of a serious risk, even on the basis of limited information.

- 10. The guidance then goes on to give a number of examples, including examples of situations where an application for an interim order may be justified prior to criminal charges being brought. This is a significant shift in emphasis compared to the previous guidance, which suggested that, where no criminal charges had been brought, there would need to be "underlying evidence which satisfies the test required for an interim order".

11. The new guidance also includes a completely new section on discrimination and interim orders. This section emphasises the seriousness with which we take allegations of discrimination and the potential risks not only to public confidence, but also of harm to those receiving care, that deep-seated discriminatory attitudes may pose.
12. The new guidance also includes sections on not having the necessary knowledge of English, freedom of expression and incorrect or fraudulent entry allegations. These sections largely replicate material contained in the previous version of guidance, although some minor amendments have been made for the purposes of clarity and consistency. For example, a reference to “the prima facie test” has been removed from the section on freedom of expression.

Conclusion

13. In summary, the major substantive changes introduced by the new guidance are:
 - i. A move to a more holistic approach to decision-making in relation to interim orders; the new guidance no longer insists that there must be “sufficient evidence” or a “prima facie case” before an interim order can be considered.
 - ii. Express guidance in relation to serious criminal offences that “in cases of the utmost seriousness, the panel may be satisfied that there is cogent evidence of a serious risk, even on the basis of limited information”.
 - iii. New guidance highlighting the circumstances in which an interim order based on allegations of discrimination may be justified.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief of its truth.

Signed:

PD

Dated: 31 May 2024